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A Legal View

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Segregation in the Schools

BY JOHN T. FEY

THE recent Supreme Court ruling in *Brown* v. *Board of Education* and its four companion cases is not the final chapter on segregation in the public schools. To the contrary it is a reopening of all segregation's many problems — social, economic, and political. It is a beginning of a tremendous task of integration, requiring patience, tact, and understanding. This fact was recognized by the Court when it deferred a determination as to the ways and means of implementing its decision, to which point argument will be directed next Fall. Thus segregation was not ended forthwith.

In considering the Court's decision and the period of transition, it is important that the difference between legal doctrine and legal practice be properly emphasized. Codes, constitutions, and decisions are not law until they are interpreted and effectively administered. The recent decision did not by itself end segregation — only through its application in each school district of the South can it become the law in practice. Each district presents its problems and will require the cooperation of the administrators and citizens affected. Again, the Supreme Court has recognized this distinction and is prepared to consider such factors prior to formulating final decrees in the cases involved.

Further, the legal aspects of integration cannot be fully determined to the exclusion of social, economic, and political realities. It is in this context that the legal aspects must be examined. These forces, the pressures of the living community, must necessarily influence the application of the law. This is not to say that the status quo will continue, but rather that other forces in the community must be considered in carrying out any prescribed objective. Again the Court has made provision for consideration of this factor.

Any discussion of legal principles at this time must of necessity be out of context. At that risk we may consider likely problems of the period

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of transition in the light of existing decisions. Conclusions should be factual rather than preferential.

THE DECISION

Brown v. *Board of Education* and the companion cases ruled that segregation per se is denial of equal protection of the laws in its application to Negro public school pupils.

While referring to the Slaughter House Cases (1873), the Court could find no historical basis or precedent, and consequently, the past was of little aid in making its decision. Uniquely, the Court rested its finding primarily on present sociological and psychological considerations. After a discussion of cases involving segregation in graduate and professional schools, the Court in the case of the primary schools said, "To separate them generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Following this reasoning, the Court concluded "that in the field of public education the doctrine of 'separate but equal' has no place."

The problems of implementation are enormous. There are *financial* and *practical* questions of what to do with two sets of schools and teachers. There are *social* and *psychological* problems of adjustment of the pattern of Southern society. And, of course, there are legal questions of formulating decrees in the lower courts in these cases that would alter state laws. Even with complete cooperation these problems will require time — and with any amount of litigation they will require a generation for final settlement.

SOUTHERN REACTION

It would be conservative to conclude that the reaction to the Court's decision was mixed. This feeling was, of course, influenced by the social and economic patterns of various communities. In some parts of South Carolina, Georgia, and Mississippi, it was difficult to see an early movement toward integration. Concern for the problem was certainly understandable. There were proposals ranging from a withdrawal of state support of public schools to gerrymandering of school districts.

The proposals aimed at continuation of separate schools fit into five basic patterns.

First: A System of Private Schools. This would require a gift, lease, or sale of existing buildings and property. It would further require financial support, by grants, by scholarships, or by rendering special services. And finally, there would be the problem of management and administration, assignment of teachers and supervision of standards. It would seem apparent that some governmental assistance, state or local, would be indispensable.

Second: Individual Assignment of All Students to Particular Schools. School Board officers would have the power to designate the particular school within the district which each enrolling child should attend. Each assignment would be on an individual basis considering available facilities, health, and moral factors. Such a scheme would be implemented by a cumbersome and difficult system of appeals, so as to discourage those complaining of assignments.

Third: Free Transfer of Students Among Schools in the District. This would be similar to the assignment device, and would differ only in the

determination as to the proper school after the child's initial appearance at the school of his choice.

Fourth: Gerrymandering of School Districts. Boundaries would be altered so as to sharply differentiate between white and Negro areas of residence, attempting to include in each an all-white or all-Negro population. This system would operate best in towns and cities. This method, because of "residential segregation," could probably be carried out with a high degree of effectiveness.

Fifth: The Tri-School Proposal. Where there are now two separate schools there would be created three schools. The first would be operated on the basis of complete integration. The second and third would be white and Negro respectively and the child could elect to attend the school maintained for his race.

LEGAL CONSIDERATIONS

The recent decision unambiguously declares that state action in carrying out a segregated public school system is a denial of equal protection of the laws. While only four states and the District of Columbia were parties to the suits, this principle applies equally to all states and territories. The final decrees will differ only to adjust for local conditions which must be considered in making an orderly transition.

It would also seem reasonable to conclude that these cases determine the status of segregation in state supported colleges. Already in the Sweatt and McLaurin cases, the Supreme Court has found that segregated graduate and professional schools could not provide equal education. The reasoning in those cases was reaffirmed in the recent segregation cases, and it would seem the Court finds that state action would involve a denial of equal protection of the laws at any level of education.

In fact, the extension of the concept of state action over the past decade presents the possibility that any action, or inaction, involving the field of primary education will be held to be state action. This is certainly a likely possibility, and therefore is good reason for examining recent proposals in the light of other Supreme Court decisions.

BASIC CONCEPT OF STATE ACTION

The 14th and 15th Amendments were intended to protect Negroes from the use of governmental authority of the states in a manner prejudicial to them. This includes not only legislative action but executive and judicial action as well, as suggested by the court as early as 1879 in the case of *Virginia* v. *Rives*. State action also includes the action of any local governmental unit, and more recently has been held to include the unlawful acts of a local county sheriff in the 1947 case of *Screws* v. *U. S.* Any agent or agency deriving its authority and power from the state is capable of performing state action as recognized in the decided cases.

Shortly after establishing the concept of state action, the Supreme Court found the necessity of limiting its bounds. The opportunity came with the Civil Rights Act of 1875, which established both civil and criminal offenses for discrimination by private owners of inns, theaters, places of amusement, and public conveyances. The Court in the "Civil

Rights Cases (1883)", declared individual action to be beyond the bounds of the 14th Amendment, and held that the statute was therefore unconstitutional. This principle restricted state action to official acts of the state through one of its official agencies.

EXPANSION OF THE CONCEPT

Despite the exclusion of private acts from the scope of state action, recent decisions have extended the concept of state action so that the original distinctions between state and private action was virtually meaningless. The supposed immunity of private acts has faded and in some situations has been subjected to the same limitations as placed directly on states. The development of this extension has been neither logical nor coherent.

The expansion of state action has been along two distinguishable lines: (1) the "instrumentality theory," under which action of private organizations has been considered state action; and (2) the "redefinition theory," where the court has redefined what action by an admittedly state agency is to be considered state action.

Instrumentality Theory. This theory had its origin and growth in the attempts of Southern political party organizations to exclude Negroes from primary elections. It has been utilized to find state action in the following situations:

(1) Where the state of Texas prescribed statutory regulations for the conduct of the primary election and connected it by statutes with the ensuing general election — *Smith* v. *Allwright* (1944).

(2) Where following the Smith case, the state of South Carolina repealed all statutes affecting the primaries, but the primary remained an integral part of the general election procedure — *Rice* v. *Elmore* (1947).

(3) Where the Jaybird Democratic organization, *a private association in no way assisted by the state,* excluded Negroes from its primary in Texas — *Terry* v. *Adams* (1953).

The last case in 1953, *Terry* v. *Adams,* found state action in areas where the courts had previously been unable to discern such. Some commentators would limit these primary cases because of the interrelation with the state's election machinery. But it would seem that this decision establishes *that performance by private parties of a governmental function makes them a state instrumentality.* This theory is further supported by two decisions outside the area of primary cases. One involved the act of a privately owned town abridging the religious freedom of a trespasser on its streets — *Marsh* v. *Alabama* (1946). The second involved a discriminatory act of a privately endowed city library system which owed its powers to the state, though it was not state supported — *Kerr* v. *Enoch Pratt Free Public Library* (1945).

The Redefinition Theory. The second area of expansion of state action is found where state agency exists, and the problem is what is state action. It has been held in *Shelley* v. *Kraemer* (1948) and in *Screws* v. *U. S.* (1947) that a state acts even when its agencies abuse or exceed their authority. The action of a state court in enforcing a private racial restrictive covenant was sufficient to find state action. The import of the *Shelley* decision is vast, and broadly speaking would seem to make — *any and all action by any arm of the state, whether direct or indirect, close or distant,*

alone or in conjunction with private individuals or groups, state action under the 14th Amendment.

Such is the present status of the legal concept of "state action" — the area in which private school plans will be tested. All of the plans suggested present a possibility of the existence of state action.

SUMMARY OF PROBABLE ATTACKS ON SEGREGATION

There is a variety of theories that will be used to attack segregation practices during the transition period.

(1) If private schools are used they may be challenged as state instrumentalities under the state action concept. (*Terry* v. *Adams.*)

(2) Even if there is no discernible state-aid to privately organized public schools, they may be attacked on a theory of performance of a governmental function. (*Marsh* v. *Alabama.*)

(3) The affirmative action of a state in withdrawing public educational facilities may be attacked as state action. (*Rice* v. *Elmore.*)

(4) The negative position of a state in failing to prohibit discrimination in private schools may be attacked as state action.

(5) A state court's enforcement or sanction of discrimination in a private school may be attacked, under the principle of *Shelley* v. *Kraemer,* as state action.

(6) In the event of assignment or transfer of students any attempt at segregation may be attacked on the theory of the case of *Yick Wo* v. *Hopkins.* That case held a statute to be invalid as a denial of equal protection where laundry licensing could be used to exclude Chinese laundries.

(7) If state money is used to support private schools, the attack will be directed at the unconstitutional use of public funds.

(8) The creation of private schools could give rise to suits based upon impairment of teacher's tenure contracts. Rights under such contracts have been supported in the Supreme Court case of *Anderson* v. *Brand.*

CONCLUSIONS

Existing decisions and principles of state action are broad enough to encompass most of the plans which have been proposed.

It is to be hoped that the way can be shown to a satisfactory method of integration, by the Court's decrees in the five cases recently decided.

Plans used during the transition which conflict with the decided cases can only be regarded as temporary expedients. There can be no permanent forestalling of integration in view of the existing decisions. The findings are clear — only the methods and timing present uncertainty.

Most important of all is the full recognition of the Court's observation that "today, education is perhaps the most important function of state and local governments." The future relationship of the state and federal governments, as well as the measure of effective national power, will be determined by the educational systems of our states. State control of public education is the keystone to the preservation of states' rights. To surrender this control by inaction would be to impair the existing balance between federal and state power.

I am sure that we can look to the future, confident that this problem and many others will be settled by our democratic processes.

From the Jackson (Miss.) Clarion-Ledger

Jackson Negroes Share Desire For Public School Integration

(Editor's note: a majority of the spokesmen for Negroes before the Legislative Education Advisory Committee here Friday said they favored integration, not segregation, in the public schools. Saturday a reporter for The Clarion-Ledger did some house-to-house visiting in Negro residential sections to see how local colored residents feel on the subject. Here's the result of his galloping poll.)

By JAY MILNER

A characteristic of the Mississippi Negro prior to the Supreme Court ruling against segregation in public schools was his reluctance for talking freely to white people.

This negative quality apparently was blotted out by the ruling. You have no trouble getting Jackson Negroes to express opinions these days.

Some of those expressed opinions obviously are rhetorical, mere quotations from articles and speeches. Others seem results of years of thinking.

But all opinions gathered in a door-to-door, at random, survey Saturday point to one fact:

Educated Jackson Negroes agree in general with views expressed by a group of state Negro leaders, who Friday talked to Gov. White's educational advisory committee.

That is: Mississippi Negroes have a gleam in their eyes and a feeling they have a foot in the door and they don't want to lose ground now.

None of those contacted appeared arrogant or cocky about their Supreme Court-bolstered position.

Listening to them, you got the impression a child of some poor relative was discussing a pending trip to visit a rich uncle — the respect and awe for the uncle was there but the opportunity for showing off in front of him overshadowed them.

"Segregation paralyses the mind," one middleaged Negro man said. "I'm always afraid when I come into your house to wax the floors or something like that. I'm afraid I might accidentally bump into your daughter or say something wrong to your wife. And I know if I do I might go to jail for it."

He was washing a 1954 Mercury automobile in the front yard of a neat, green shuttered house, which he said he owned.

In the next block, a fat Negro woman said:

"The Negro is not gonna want to come into your home or marry your girl. He just wants an opportunity to be free."

This sentiment was put in different words by a young man who has three daughters in elementary school. He said:

"I don't say Negros want social equality but we do want social justice."

"I'm not one of those snooty Negroes who says he won't have a white man in his house," said a slender Negro man, whose daughter recently graduated from Jackson college. He pointed to his expensive mahogany dining table. "I think if you sat down at that table with my family and ate the good, clean food my wife serves your stomach would be just as happy as if you had eaten it at home."

A white representative of a northern organization visited his house one time, the man said, "he was a friend of Perry Howard's. He asked me what I did for a living to have such a nice home. When I told him I washed and polished cars he was surprised and wanted to know how I did it. I told him I don't get drunk and I save my money. All Negroes don't waste their money. All Negroes aren't the alley cats of the human race."

This man's wife said:

"I'm a Mississippi Negro, born and raised here, and I don't know about mixed schools and things like that. All I want is my rights. I mean, if a clerk in a store calls me a liar and I'm not lying, I want the right to say so. But if I say so now I might go to jail because I'm colored and she's white."

One Negro man went into his house and got a copy of the U. S. Constitution. He apparently had it in a handy place. He read the Bill of Rights almost as if he had memorized it.

A young Negro teacher said: "We (Negroes) are just waking up to the facts about the value of an education and we (Negro teachers) will see now that we can better ourselves and will have to better ourselves to compete with white teachers."

She seemed to relish the thought of that competition.

"It's not so much us getting together now," she continued. "It's the children. If we can teach Negro and white children to work together we are bound to have a better state. There are so many things you can say and wish for, but it all starts with the schools. It will take several years to make the colored children realize they can learn as much as white children, but when they do realize that it will be like taking a leash off a dog."

A graduate of a Catholic Negro college in New Orleans said it will be the "lower classes" of both races who will cause trouble when integration comes.

"If the schools were thrown open this fall only a few lower class Negroes would try to go to white schools," he said. "Most of us would rather go to our own schools if they are good enough. We realize the disadvantage we would have in white schools. But if integration comes now or 10 years from now or in gradual stages, the trouble will still come with it. This is because of ignorant people of both races. Thinking whites and colored people have made great strides in relationship in Mississippi because of our younger people feeling it is the individual that counts."

He said his alma mater holds an inter-racial picnic annually in Bay St. Louis.

"And the surprising thing is that there we were, whites and Negroes, playing baseball, ping pong and other games together and no one to think anything about it."

Southerner Counsels Against Heritage of Hate

(Reprinted from the Asheville, N. C., CITIZEN-TIMES)

Editor of the *Citizen-Times*:

I've been reading the letters in your paper regarding segregation. Being a typical white Southerner, I find the idea of non-segregation hard to swallow, even though I know that morally and constitutionally it is wrong. Also, I know that this attitude of mine was formulated by my ancestors who fought the Civil War and was handed down to me. It did not originate with me, but at the same time it cannot be uprooted over night or with a decision of the Supreme Court. The only thing left for me to do is to refrain from handing down this feeling to my children and my neighbors' children. To some of my friends, this feeling has reached the point of hate. It is my opinion that the world is filled with too much hate and that we should not add to the burden of our children by teaching them to hate some one just because he is not of the same color.

May I pass on this story about a teacher who taught all races? She seated the white on the front seat, then the red and yellow, and on the back seat the black. She had a dream, so the story goes; and in this dream Jesus walked into the room. When His light shone on the children, all were bright and looked alike, so that she could not tell the white from the black.

Yes, non-segregation makes my blood boil; but, I'm sure of one thing, it can boil over before I will be guilty of planting a seed of hatred in the heart of one of my happy, carefree children. Instead, I'm teaching them that they are pioneers of a great undertaking, as are the colored people. They have the opportunity to help lay the foundation for future generations. To all Southern people I would like to say: "Let's cease the guns of the Civil War and be concerned with making the world a better place in which to live. Whatever your ideas of segregation, don't discuss them in the presence of your children and thus be guilty of teaching them to hate."

MRS. J. C. BRYSON.

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